YEW MUN KHEAN v. KUMPULAN LIZIZ SDN BHD

HIGH COURT MALAYA, IPOH
HAYATUL AKMAL ABDUL AZIZ JC
[CIVIL SUIT NO: AA-22NCVC-88-06-2016]
25 MARCH 2018

LABOUR LAW: *Employment – Dismissal – Constructive dismissal – Employee's refusal to comply with employer's transfer and secondment orders – Whether orders lawful and not made in bad faith – Whether prerogative of employee to veto such orders – Whether there was victimisation – Whether employee voluntarily left employment by not reporting for duty – Whether employee came to court with clean hands – Whether employer retains equal right lawfully to terminate contract – Whether employee constructively dismissed by employer*

The plaintiff held the position of Financial Controller of the defendant company ('the defendant') with a monthly salary of RM16,500. Based on the alleged tight financial position of the company, the defendant reduced the plaintiff's salary to RM8,250 with a proviso that the salary would be reinstated once the financial position of the defendant improved. Subsequently, the defendant confirmed the pay reduction exercise and transferred the plaintiff to the office in Gua Musang, Kelantan as Finance Manager/Financial Controller. The plaintiff, however, took the option to stay put in the Ipoh Head Office with an agreed salary reduction ('varied terms of employment'). The defendant then issued the plaintiff a letter asserting that the proposal for the restructured employment was not workable and impractical and issued a letter for the plaintiff's secondment to Gua Musang Kelantan and Terengganu, which was not complied by the plaintiff. Consequently, the defendant demanded for the plaintiff to explain his refusal to comply with the instructions given but the plaintiff denied violating any terms and conditions of his employment and instead relied on the varied terms of employment. The defendant held a domestic inquiry against the plaintiff for failure to comply with the transfer order and secondment orders and other charges filed against the plaintiff. The domestic inquiry tribunal was satisfied that the plaintiff was found guilty of all the charges filed against him but recommended not to take any action against the plaintiff but instead issued several notices to the plaintiff directing him to return to work, which was all blatantly ignored by the plaintiff. The defendant thus dismissed the plaintiff. Hence, the plaintiff filed this claim against the defendant for constructive dismissal. The defendant, on the other hand, counterclaimed the loss of services suffered by the defendant from the plaintiff as a result of the latter's action in breaching his employment. The issues that arose were (i) whether the defendant had terminated the employment or cause the

A constructive dismissal of the plaintiff's employment or whether the plaintiff had walked out of his employment; and (ii) if the defendant had wrongfully terminated the plaintiff's employment, whether the plaintiff had suffered loss and damages.

Held (dismissing plaintiff's claim; allowing defendant's counterclaim):

B

(1) The equitable doctrine is well settled that when a party comes to court he has to ensure that his hands are not tainted. Obviously in this case, the plaintiff's hands were not clean of misconduct in his employment with the defendant. The plaintiff had wilfully disobeyed the lawful and reasonable orders to be seconded to Gua Musang and Terengganu in C defiance of this doctrine. Similarly, he had defied several written notices to report back for work. The defendant's orders seconding the plaintiff was lawful which was expected in any organisation with the size of the defendant's undertaking. There was no evidence of bad faith in those orders and certainly it was not for the employee to question such orders. D It was not the prerogative of the plaintiff to veto such orders as allowing such an action would paralyse the organisation. (paras 43 & 44)

(2) The plaintiff was in breach of the superior orders doctrine. A contract of employment cannot remain static over a period. Some element of change is inevitable. If the plaintiff refused to accept the order to be E seconded to Gua Musang and Kuala Terengganu respectively, this did not mean that he could exercise a power of veto over the said order if the employer justified the order. As an employee, he was to comply with the lawful orders but was allowed to address grievances at a separate forum. Ultimately the employer retains an equal right lawfully to F terminate the contract. Throughout the proceeding, the plaintiff had not been able to adduce any shred of material or probative value that would show elements of *mala fide* and/or unreasonableness in the actions of the defendant in seconding him to the defendant's offices in Gua Musang and Terengganu temporarily in order to set up the internal financial G control system to which as the Group Financial Controller he was more appropriate to undertake. (para 45)

(3) This court was not convinced on the alleged substantial breach of contract by the defendant or victimisation in the circumstances of the case. The court could not uphold a plea of victimisation in the absence H of positive proof. Further, as to the issue of the unilateral reduction of pay constituting a breach on the part of the employer, the plaintiff did not seek to enforce his right when it occurred which subsequently over a period of three months was rectified by the defendant. The plaintiff had waived his right to act on it but instead varied the terms of the I employment. Thus, the issue of constructive dismissal in such circumstances did not arise (paras 46-48)

(4) There was no reason to hold that the plaintiff had been constructively dismissed. The plaintiff had voluntarily left the employment of the defendant. He elected not to exercise his right to report back for duty and then address his grievances with the defendant. There was simply no plausible evidence sufficient in law that the defendant had directly dismissed SP3 and/or cause him to be constructively dismissed. SP3 failed to prove its case against the defendant. (para 50)

Case(s) referred to:
Anwar Abdul Rahim v. Bayer (M) Sdn Bhd [1998] 2 CLJ 197 CA ***(refd)***
Assembly Services Sdn Bhd, Shah Alam & Ors v. Motor Assemblers Supervisory Staff Union, Peninsular Malaysia [1985] 1 ILR 489 ***(refd)***
Bayer (M) Sdn. Bhd v. Anwar Abdul Rahim [1996] 2 CLJ 49 HC ***(refd)***
Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***
Farrant v. Woodroffe [1980] IRLR 50 ***(refd)***
Ladang Holyrood v. Ayasamy Manikam & Ors [2004] 2 CLJ 697 CA ***(refd)***
Mayban Assurance Bhd v. Ujang lbrahim [2012] 4 ILR 579 ***(refd)***
MTDC Technology Media Sdn Bhd & Anor v. Loke Wai Yue [2007] 1 ILR 200 ***(refd)***
Ngeow Voon Yean v. Sungei Wang Plaza Sdn Bhd/Landmarks Holding Bhd [2006] 3 CLJ 837 FC ***(refd)***
Quah Swee Khoon v. Sime Darby Bhd [2001] 1 CLJ 9 CA ***(refd)***
Soon Seng Cement Products Sdn Bhd & Anor v. Non Metallic Mineral Products Manufacturing Employees's Union [1996] 1 ILR 414 ***(refd)***
Suresh Kumar Karpayah v. Golden Screen Cinemas Sdn Bhd [2013] 4 ILR 174 ***(refd)***
Top Glove Sdn Bhd v. Suppaiyah Krishnan & Anor [2006] 3 ILR 1990 ***(refd)***
Wallace v. United Grain Growers Ltd [1998] 152 DLR (4th) 1 ***(refd)***
Western Excavating (EEC) Ltd v. Sharp [1978] 1 All ER 713 ***(refd)***
Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298 SC ***(refd)***
Woods v. VM Car Services Ltd [1982] IRLR 413 ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, s. 20

Other source(s) referred to:
Ashgar Ali Ali Mohamed, *Dismissal from Employment and Remedies,* LexisNexis, 2nd edn, 2014, pp 183, 187

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A

JUDGMENT

Hayatul Akmal Abdul Aziz JC:

Introduction

B **[1]** The subject matter of this civil suit revolves on the issue pertaining to loss of salary and bonuses with an alternative prayer for purported wrongful termination or constructive dismissal of the plaintiff in the employment of the defendant.

C **[2]** Briefly, the plaintiff filed a writ of summons (encl. 1) and statement of claim (encl. 2) against the defendant as follows:

(a) The sum of RM750,750 in respect of loss of monthly salary of RM10,500 per month from 15 January 2016 to 31 December 2021;

(b) The sum of RM210,000 in respect of loss of annual minimum cash bonus of RM35,000 from 2016 to 2021;

D

(c) Alternatively to prayer (a) above, damages for wrongful termination or constructive dismissal of the plaintiff, to be assessed;

(d) Damages for loss of reputation to be assessed;

(e) Damages for mental anguish to be assessed;

E

(f) Exemplary damages;

(g) Aggravated damages;

(h) Interest And Cost

F **[3]** Upon the full hearing of the matter which was held on 16-17 January 2017, 2-3 March 2017, 27-29 March 2017, 10-12 July 2017 (vacated), 9-10 October 2017 and 7 November 2017 respectively, with the list of witnesses as follows:

G (a) The plaintiff (SP3) had called three witnesses Ms Leong Chee Mun (SP1), Account Executive (ex-account supervisor of the defendant), Mr Au Kok Wah (SP2), Account Assistant (ex-account assistant of the defendant) and Encik Ghazali Abdul Halim (SP4) (Chairman/ shareholder of the defendant).

H (b) The defendant had called two witnesses, Ms Chin Set Fui (SD1), Human Resource Officer with the defendant and Mr Liew Ah Kau (SD2), Managing Director of the defendant.

I

[4] The evidence from the parties have been duly recorded and upon perusing all the evidence presented, relevant cause papers and the respective written submissions by counsel, on 29 December 2017, I find the plaintiff had on balance of probabilities failed to prove his case and I accordingly dismissed his claim against the defendant. For the counterclaim, I find the defendant had on a balance of probabilities proved its case against the plaintiff and I allowed the said counterclaim with damages to be assessed by the Senior Assistant Registrar. Dissatisfied with the above decisions, the plaintiff is now appealing against both decisions.

Brief Facts

[5] Parties have filed their agreed facts and it was marked as "D". In preparing these brief facts, I have also perused the evidence and the exhibits that I have before me. Briefly, the facts are as follows.

[6] The plaintiff (SP3) is a Malaysian citizen who was an employed officer of the defendant and had commenced his employment on 16 March 1995 as a Finance Manager with a monthly salary of RM4,500. From 1 January 2014, he held the position as the Financial Controller with a monthly salary of RM16,500. The main responsibility of the plaintiff was to handle all financial and finance-related issues of the defendant (refer para 4, "D").

[7] The defendant is a private limited company duly registered under the Companies Act 1965 and is part of a group of companies known as Liziz Group of Companies which includes Liziz Plantation Sdn Bhd and Syarikat Pembinaan Aiong Sdn Bhd. There are three shareholders of the defendant, ie, Mr Liew Ah Kau (SD2) who is also the Managing Director of the defendant, Encik Ghazali Abdul Halim (SP4) who is an Executive Director and also the Chairman of the defendant and Mr Liew Ah Yong ("LAY") who is a shareholder and also the younger brother of SD2 (not called as a witness). According to SP4, each shareholder holds equal shares of 33% of the shares in the company, but however, there is a trust agreement in place where SP4 is holding certain number of shares for SD2 upon trust. Officially SP4 holds 70% shares, SD2 holds 20% and LAY holds 10%. In 2013 (an event occurred which I will elaborate below), LAY sold his shares to SP4 and SD2. After the said sale, SP4 still holds 70% share (subject to the trust agreement mentioned earlier) but SD2 had increased his holding to a 30% stake in the company.

[8] SP3 in his evidence confirmed that he has always reported directly to SD2 and this was affirmed by the evidence of SP4 and SD2. SP3 claimed that sometime in 2013, a dispute arose between the shareholders (allegedly involving the misappropriation of funds by SD2 amounting to RM20m). With SP3 acting as an intermediary, the dispute was then settled by the

signing of a "Deed of Compromise and Mutual Exchange of Shares" dated 14 August 2013 (exh. P5) for a consideration of RM20m. SP3 claimed that as he was able to settle the shareholders, dispute, the company in return issued him a letter of assurance of continuous employment whereby on 28 August 2013, SP4 signed the said letter of assurance of continuous employment of SP3 for the defendant (exh. P7). It is to be mentioned at this juncture that this letter was drafted and prepared by SP3, without first referring to the Human Resource Department of the defendant. According to SP4, SP3 met him with exh. P7 asking him to sign and according to SP4, he signed the letter in good faith that everything was in order.

[9] Approximately 16 months later the defendant however, based on the alleged tight financial position of the company had on 29 December 2014, through SP4 issued SP3 a letter dated 29 December 2014 (exh. P8) whereby the defendant reduced SP3's salary from RM16,500 to RM8,250 with a proviso that the salary will be reinstated once the financial position of the defendant had improved. On 20 January 2015, SP3 *via* a letter (exh. P10), among others, objected to the salary reduction and argued that since the letter carries the letterhead of Syarikat Pembinaan Aiyong (group company) and not the defendant, therefore the said letter was not an official letter from the defendant.

[10] The defendant subsequently however, had *via* a letter dated 21 March 2015 (exh. P14) confirmed the pay reduction exercise for the month January and February 2015 and in the same letter transferred SP3 to the office in Gua Musang, Kelantan as Finance Manager/Financial Controller. SP3 then wrote SP4 a letter dated 31 March 2015 (exh. P15) confirming the discussion SP3 had with SD2 where SP3 took the option to stay put in Ipoh Head Office with an agreed salary reduction. A letter dated 14 April 2015 which SP3 referred as "Varied Terms of Employment" was duly signed by SP3, SP4 and SD2 (exh. P17) stating the terms of employment as agreed by the parties.

[11] However on 28 May 2015, the defendant issued SP3 a letter dated 28 May 2015 (exh. P18) asserting that the defendant's proposal for the restructured employment (exh. P17) was not workable and impractical. In the circumstances, the defendant proposed to revert to the former terms and conditions of employment with effect from 1 June 2015. SP3 *via* his letter dated 1 June 2015 (exh. P19) rejected the defendant's suggestion and stated his wish to maintain the terms as agreed earlier on 14 April 2015 (exh. 17).

[12] The defendant then issued SP3 a letter dated 20 June 2015 (exh. P20) for his secondment to Gua Musang, Kelantan for a few months to help set up a suitable financial system of internal controls for the company's plantation and mill operations. However, by a letter dated 26 June 2015

(exh. P21), SP3 issued a letter stating that he was unable to take up the proposed secondment and refused to comply with the said instruction by the defendant.

[13] The defendant then issued SP3 a letter dated 14 September 2015 (exh. P22) for his secondment to Terengganu for a few months to set up a suitable financial system of internal controls for the company's operations. SP3 however, by a letter dated 30 September 2015 (exh. P23), issued a letter stating that he was unable to take up the proposed secondment and again refused to comply with the said instruction by the defendant.

[14] Consequently, the defendant then issued a letter dated 6 October 2015 (exh. P24) demanding SP3 to explain his refusal to comply with the instructions given by the defendant *via* their letters dated 20 June 2015 (exh. P20) and 14 September 2015 (exh. P22). In his written reply, dated 8 October 2015 (exh. P25), SP3 denied violating any of the terms and conditions of his employment and instead relied on the varied terms of employment (exh. 17).

[15] The defendant followed up with the issuance for a notice for domestic inquiry against SP3 dated 15 October 2015 (exh. P26) for failure to comply with the transfer order and secondment orders and other charges filed against SP3 where he was suspended from his post pending the determination of the domestic inquiry proceeding. In his defence, SP3 *via* his letter dated 9 November 2015 (exh. P27) referred to his letter dated 26 June 2015 (exh. P21) and 30 September 2015 (exh. P23), denied any violation of the varied terms of employment. On 9 November 2015 additional charges were filed against SP3 (exh. P31). The domestic inquiry was held on 9 November 2015 and 7 December 2015, where the domestic inquiry tribunal was satisfied that SP3 was found guilty of all the charges filed against him but however, the said tribunal recommended not to take any action against SP3 where he was instead instructed *via* a letter dated 7 January 2016 (exh. P37) to report for duty on 11 January 2016.

[16] SP3 however, *via* his letter dated 11 January 2016 (exh. P36) to the defendant, sought the defendant's confirmation of his varied terms of employment. The defendant then issued a further letter dated 12 January 2016 (exh. P40) instructing SP3 to report for duty on 14 January 2016 but in defiance, he still failed to do so. This causes the defendant to issue a final reminder dated 15 January 2016 (exh. D57) instructing SP3 to report for duty but again in defiance SP3 failed to do so.

[17] SP1 and SP2 in their evidence confirmed that sometime in October 2015, SD2 called for a staff meeting and they were notified during this meeting that SP3 no longer works for the defendant. SP1 and SP2 confirmed that SP3 was dismissed by the defendant.

[18] SD1 is the Human Resource Officer of the defendant and confirmed that the meeting that was held on 16 October 2015 was to inform the staff that SP3 employment has been suspended and during cross-examination, she disagreed when it was put to her that SP3 was actually dismissed from the defendant.

[19] SD2 is the Managing Director of the defendant and in his evidence maintained that the defendant had never dismissed or constructively dismissed SP3 and alleged that SP3 was the one who unilaterally in breach walked out of his employment. Even though the defendant's domestic inquiry tribunal found SP3 to be guilty of misconduct at the conclusion of the proceeding, the defendant elected not to dismiss SP3 from his employment. As a matter of fact, the defendant had issued several notices to SP3 directing him to return to work, but all was blatantly ignored by him. Therefore as a result of his action breaching his employment, the defendant counterclaimed the loss of services suffered by the defendant from SP3 as prayed in paras 5-10 of its counterclaim.

Issues To Be Tried

[20] Parties have filed the issues to be tried and marked as "E". The issues are as follows:

(i) Whether the defendant had terminated the employment or cause the constructive dismissal of the plaintiff's employment or whether the plaintiff had walked out of his employment.

(ii) If the defendant had wrongfully terminated the plaintiff's employment, whether the plaintiff has suffered loss and damages as stated in para 41 of his statement of claim.

The Plaintiff's Submissions

[21] Learned counsel for the plaintiff argued that the crux of SP3's claim against the defendant is based on the express terms of the varied terms of employment (exh. 17), which effectively varied the terms of SP3's employment, in that, for a substantial reduction in SP3's salary of more than 36%, from RM16,500 to only RM10,500, an assurance of employment from 2015 to 2021 was given and SP3's scope of duties limited to liaising with bankers, advising management on commercial and legal disputes and advising the company and the group on business and corporate matters (cl. 3), additional 90 days leave, SP3 has the flexibility of his own time management, sole discretion on venue of work and can be contactable during official working hours.

[22] I was alluded to the case of *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269; [2010] 1 MLJ 597 where Federal Court held that:

> [42] Here it is important to bear in mind that a contract is to be interpreted in accordance with the following guidelines. First, a court interpreting a private contract is not confined to the four corners of the document. It is entitled to look at the factual matrix forming the background to the transaction. Second, the factual matrix which forms the background to the transaction includes all material that was reasonably available to the parties. Third, the interpreting court must disregard any part of the background that is declaratory of subjective intent only. Lastly, the court should adopt an objective approach when interpreting a private contract …

[23] Learned counsel further argued that the court should not be concerned with introducing terms to exh. P17 to make it fairer or more reasonable but should only be concern with what the relevant words in exh. P17 connotes.

[24] It was submitted that the cumulative meaning of the provisions in exh. P17 are as follows:

(a) Clause 4 provides SP3 sole discretion over his venue of workplace in that it was mandatory for the defendant to recognise that SP3 is the only person who could determine the venue of his workplace. Learned counsel submitted that the terms are reasonable in that:

  (i) SP3 has given up more than 36% of his salary for the rights accorded to him under exh. P17;

  (ii) It was within the knowledge of both parties that it was of fundamental importance that SP3 remain in Ipoh, Perak to care for his ailing mother;

  (iii) In any event, SP3 would remain contactable *via* his mobile phone during official working hours; and

  (iv) SP3 is given the flexibility of own time management and his venue of workplace which means SP3 flexibility in determining where he worked from, and his working hours, which again, was entirely reasonable as SP3 would remain contactable *via* handphone during official hours.

(b) Clause 6 provides that it is irrevocable, which bears the indisputable meaning that the terms of exh. P17 could not be reversed or cancelled.

(c) Clause 7 provides that except for the above terms, all other terms and conditions of employment of SP3 shall remain unchanged. In other words, learned counsel argued, this means the terms and conditions of employment of SP3 has been expressly changed by the content of exh. P17.

[25] Learned counsel submitted that, from the facts of this case, it is apparent that the defendant is guilty of breaching exh. P17 which goes to its foundation that the defendant has evinced an intention to be no longer bound by exh. P17 and the "critical events" that occurred support the plaintiff's contention or can be construed as SP3 been constructively dismissed from his employment by the defendant in bad faith and that the defendant had unlawfully terminated his employment. Briefly, the critical events are as follows:

(a) The misappropriation of funds (RM20m) by SD2 and the subsequent letter issued for the "Assurance of Continuous Employment";

(b) The unilateral reduction of SP3's salary (exh. P8 and P14);

(c) The varied terms of employment of SP3 (exh. P17) with no intention of honouring the same;

(d) The attempted unilateral secondment of SP3 to Gua Musang, Kelantan;

(e) The second attempted unilateral secondment of SP3 to Terengganu;

(f) The domestic inquiry ("DI");

(g) Events after the DI, among others is the placing of closed-circuit camera ("CCTV") in the vicinity of SP3's office, the refusal of SD2 to amend the notes of DI and eventually SP3 set out his position that he has been constructively dismissed.

The Defendant's Submissions

[26] Learned counsel for the defendant submitted that it is settled that 'constructive dismissal' arises when an employee terminates his contract of employment and therefore considers himself discharged from further obligations because the employer is guilty of such breach which affects the foundation of the contract or because the employer has evinced or shown an intention no longer to be bound by such contract. Common law principles are relevant to the determination of constructive dismissal. If the employee delays in terminating the contract, he may be regarded as having elected to affirm the contract and would lose the right to treat himself as discharged. Repudiatory conduct consisting of a series of acts or incidents can give rise to a claim for constructive dismissal.

[27] It is further argued by the said counsel that there are four conditions which have to be met by the plaintiff to be able to successfully claim for constructive dismissal as was decided in the High Court decision in *Bayer (M) Sdn. Bhd v. Anwar Abd Rahim* [1996] 2 CLJ 49, ie; (i) there must be a breach of contract by the employer; (ii) the breach must be sufficiently

important to justify the employee resigning; (iii) the employee must leave in response to the breach and not for any other unconnected reason; (iv) and he must not occasion any undue delay in terminating the contract otherwise he will be deemed to have waived the breach and agreed to vary the contract.

[28] I was alluded to the decision of the Court of Appeal in *Anwar Abdul Rahim v. Bayer (M) Sdn. Bhd.* [1998] 2 CLJ 197; [1998] 2 MLJ 599, which endorses the aforementioned decision. It is the argument of the said learned counsel that the plaintiff has failed to satisfy all four conditions set out above and the fact that the plaintiff is now relying on the principles of constructive dismissal is misconceived, both in fact and in law.

[29] As for the issue of the salary reduction, it was argued that it had been expressly stated in the said letter that the said action was temporary in nature and once the financial position of the defendant improves, the plaintiff's full salary was to be reinstated. However, this issue is no longer valid since the defendant had fully paid the shortfall of the plaintiff's salary for the months of January, February and March 2015 in the month of May 2015. Apart from the plaintiff, there was one other employee, a site manager, who was also issued a letter by the defendant to propose a reduction of salary. Therefore, learned counsel submitted that there was no singling out the plaintiff as obliquely suggested by the plaintiff. In any event, when the issue of the salary deduction occurred, the plaintiff had not taken any legal recourse to address the salary deduction situation at all and it was resolved three months later. There is no valid basis to bring up this dead issue as it has been overtaken by subsequent events. It is argued that the defendant as an employer, has the prerogative and inherent/implied powers to conduct domestic inquiry against any employee, including the plaintiff for misconduct committed during the course of the employees' employment period.

[30] The plaintiff was given every opportunity to defend his position during the domestic inquiry proceeding. All the required procedure were followed to ensure legitimacy of the said proceeding. For all intent and purposes, SP3 was accorded the right to be heard. It was further argued that this lawful domestic inquiry proceeding cannot be made one of the subject matter for a claim for constructive dismissal. It is the valid finding of the domestic inquiry tribunal that the charges levelled against the plaintiff had been proven. The company however, notwithstanding that finding by the said tribunal, elected to retain the plaintiff's employment with the defendant. The defendant had on three separate occasion (exh. P37 (7 January 2016), P40 (12 January 2016) and D57 (15 January 2016)] issued written instruction for SP3 to report for work but in defiance it was blatantly ignored

by him while SP3 on the other hand claimed that the defendant had prematurely and recklessly announced his dismissal from the defendant's employment with effect from 17 October 2015 as told to him by SP1 and SP2 who claimed they heard it being said by SD2, of which SD2 refuted that such a statement was made at a staff meeting of the defendant as claimed.

[31] As for SP1 and SP2, it was submitted that they are not reliable witnesses and their evidence should be rejected as both witnesses are not sure of the words purportedly uttered by SD2. Further, their answers are identical which is too much of a coincidence. The fact remains that what SP1 and SP2 testified was totally contradictory to the facts which unfolded. SP3 was not dismissed as wrongly alleged by them.

[32] It was further submitted by learned counsel that, right at the outset, the defendant was perplexed as to the reason why the plaintiff was making such demands which finally resulted in the plaintiff's letter. The actual reason came to light during trial when it was discovered that the plaintiff had set up his own business known as 'TCY Asset Management Services'. To be exact, the plaintiff became a partner of the said business on 9 December 2015 wherein the 'business start date' was also 9 December 2015.

[33] It is further submitted that based upon exh. D60 (SSM search report on the company set up by SP3), it is evident that SP3 had, at all material times, acted in bad faith and schemed to profit improperly from the defendant. The fact that the plaintiff had withdrawn his claim from the Industrial Court shows that he is not interested in reinstatement, instead, he is hoping for a higher damages as a windfall in this court. The defendant had at all material times abided to the terms and conditions of the varied terms of employment and strongly deny that the plaintiff is entitled to claim for the reliefs prayed for. The alleged constructive dismissal by the plaintiff is done in bad faith and is wrong in fact and law as he only walked out from his job after the decision of the panel of the domestic inquiry. The defendant had made all attempts to get the plaintiff to return and report for work but the plaintiff refused and continued to be absent from work. He also began to make unreasonable demands.

The Law On Constructive Dismissal

[34] It is settled as in *Anwar bin Abdul Rahim*, CA case *(supra)* that the pre-requisite in filing a claim for constructive dismissal are as follows:

(a) There must be a breach of contract by the employer/defendant. This may either be an actual breach or anticipatory breach;

(b) That breach must be sufficiently important to justify the employee/plaintiff resigning or else it must be the last in a series of incidence, *albeit* an erroneous interpretation of the contract by the employer will not be capable of constituting a repudiation in law;

(c) The employee must leave in response to the breach and not for some other, unconnected reason; and

(d) The employee must not delay too long in terminating the said contract in response to the alleged breach by the employer or else he may be deemed to have waived the alleged breach.

[35] Lord Denning MR in looking at the decision of Browne Wilkinson J in *Woods v. VM Car Services Ltd* [1982] IRLR 413 at 415, stated:

> Just as a servant must be good and faithful, so an employer must be good and considerate. Just as in the old days an employee could be guilty of misconduct justifying his dismissal, so in modern times an employer can be guilty of misconduct justifying the employee in leaving at once without notice.

[36] In industrial law, the employer has every right to reorganise his business in any manner for the purpose of economy or convenience provided he acts *bona fide*. Constructive dismissal does not mean that an employee can automatically terminate the contract when his employer had acted or behaved unreasonably towards him. The employer's wrongful conduct must be serious, amounting to a fundamental breach of contract where a reasonable person would be able to conclude that the employer had evinced an intention not to be bound by the contract any longer. The employer's conduct has to be looked at as a whole and its cumulative impact to be assessed. Only actual conduct of the employer and not the perception of that conduct by the employee can potentially support a constructive dismissal claim. In other words, the employee's subjective opinion or personal reaction to the change is irrelevant. What is relevant is whether, from an objective standpoint, the change to the employment relationship was fundamental in nature (see *Dismissal from Employment and Remedies*, 2nd edn by Ashgar Ali Ali Mohamed, LexisNexis, 2014, pp 183, 187). It is a legal requirement in constructive dismissal cases that the employee concerned must inform the employer of his claim of constructive dismissal or it would be fatal to the claim. The employee can then regard himself as having been dismissed and resigned from employment without serving notice and thereafter alleging unfair dismissal.

[37] The implied obligation of mutual trust and confidence has become generally accepted and applied in the consideration and ruling on relevant disputes concerning dismissal. Therefore, whenever an employee is to be dismissed, demoted or reprimanded for his conduct, he should be fairly dealt with and given the opportunity to answer the allegation. As stated earlier, breach of the implied term of trust and confidence is regarded as a fundamental breach that goes to the root of the contract (see *Wallace v. United Grain Growers Ltd* [1998] 152 DLR (4th) 1 at 8, SC, Can). The burden of

proving constructive dismissal lies on the claimant. He has to prove on a balance of probabilities that the employer has committed the breach and as a result he left the employment. It is incumbent upon the claimant to establish the conditions constituting constructive dismissal, in that, firstly, the employer by its conduct had breached the contract of employment; secondly, that the terms which had been breached went to the foundation of the contract; thirdly, that the employee pursuant to and by reasons of the aforesaid breach had left the employment and not for some other reasons; and fourthly, that the employee left at an appropriate time soon after the breach complained of (see English Court of Appeal in *Western Excavating (EEC) Ltd v. Sharp* [1978] 1 All ER 713, CA Eng.). In *MTDC Technology Media Sdn Bhd & Anor v. Loke Wai Yue* [2007] 1 ILR 200, there was a delay of two months after an alleged repudiatory act by the company. It was held that the claimant by her inordinate delay must be taken to have waived the breach and to vary the contract. In other words, the claimant had affirmed the new terms of the contract, while in *Top Glove Sdn Bhd v. Suppaiyah Krishnan & Anor* [2006] 3 ILR 1990 the claimant failed to prove that his transfer was tainted with *mala fides* on the part of the company. The facts instead showed that the transfer was authentic as it resulted from an urgent request by the Klang factory. There was absolutely no evidence that the company wanted or intended to ease out the claimant under the guise of exercising its management power of transfer due to his union activities. In this regard, I do take cognisance of the settled position as stated in *Woods* case *(supra)* Browne-Wilkinson J reprimanded such practice. His Lordship stated that:

> Any employer who wishes to get rid of an employee or alter the terms of his employment without becoming liable either to pay compensation for unfair dismissal or a redundancy payment have had to resort to methods of 'squeezing out' an employee stopping short of any major breach of the contract, such an employer attempting to make the employee's life so uncomfortable that he resigns or accepts the revised terms. Such an employer, having behaved in a totally unreasonable manner, then claims that he has not repudiated the contract and therefore that the employee has no statutory right to claim either a redundancy payment or compensation for unfair dismissal.

[38] However, I find no such evidence to support such proposition in the present case as the facts had shown which I had tabulated for ease of reference at para. [37] below. In *Suresh Kumar Karpayah v. Golden Screen Cinemas Sdn Bh*d [2013] 4 ILR 174, it involves the allegation of *mala fide* transfer to a different branch of the company. The claim was dismissed as the claimant failed to show that the transfer from Puchong to Johor Bharu branch was *mala fide* and tantamount to a victimisation on the part of the company. Transfers had always been at the prerogative of the company. In *Mayban Assurance Bhd v. Ujang lbrahim* [2012] 4 ILR 579, it involves a transfer order due to a

restructuring exercise. Claimant had resigned on his own accord. It was held that the claimant failed to prove that the company, in exercising its management prerogative to transfer, was in breach of a fundamental term in his contract of employment or had evinced an intention not to be bound by it. The evidence adduced in fact showed that the claimant did not even bother to report for duty to the transferred position and had abandoned his employment claiming constructive dismissal.

[39] If a claimant failed to prove on a balance of probabilities that the employer was in breach of a significant or fundamental term of the contract of employment, the Industrial Court will hold that the claimant had left the company at his own will or resigned voluntarily and not that he was constructively dismissed by the company. The repudiatory conduct of the employer may consist of a series of acts or incidents. In *Quah Swee Khoon v. Sime Darby Bhd* [2001] 1 CLJ 9; [2000] 2 MLJ 600, CA, Gopal Sri Ram JCA stated as follows:

> … Constructive dismissal can take place … in a number of cases. Since human ingenuity is boundless, the categories in which constructive dismissal can occur are not closed. Accordingly, a single act or a series of acts may, according to the particular and peculiar circumstances of the given case, amount to constructive dismissal.

[40] In *Wong Chee Hong v. Cathay Organisation Malaysia Sdn Bhd* [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298 the Industrial Court said:

> The common law has always recognised the right of an employee to terminate his contract of service and therefore to consider himself as discharged from further obligations if the employer is guilty of such breach as affects the foundation of the contract or if the employer has evinced or shown an intention not to be bound by it any longer.

Findings Of This Court

[41] Before I proceed further, I would briefly mention the issue on why the plaintiff had chosen to file his claim in the High Court and not at the Industrial Court even though the latter is clothed with sufficient jurisdiction to hear this matter under s. 20 of the Industrial Relations Act 1967. At the early stage of this trial, I have posted both counsel this issue and I was then made to understand that the plaintiff is claiming for loss of salary and the claim for constructive dismissal is an alternative claim and therefore plaintiff had withdrawn their claim in the Industrial Court and had instead filed this claim in the High Court. Both counsel confirmed the above facts and have no objection for this court to proceed with the hearing of this matter. The plaintiff is seeking compensation for purported constructive dismissal of his employment with the defendant as set out in the statement of claim. The defendant's denial is as set out in the statement of defence.

[42] For ease of reference in examining the pertinent facts, I have tabulated the events in sequence of its chronological dates in order to determine whether the facts adduced support the plaintiff's claim of constructive dismissal.

No	Dates	Particulars	Exhibit
1	15/3/1995	SP3 commences employment.	
2	28/8/2013	Claimed to have resolved internal shareholders dispute and was issued a letter of assurance for continuous employment fully drafted and prepared by SP3 without the intervention of the HR department.	P7
3	29/12/2014	Approximately after 16 months a letter issued by defendant to reduce the salary due to tight financial position.	P8
4	20/1/2015	SP3 *via* a letter objected to the salary deduction and claimed that the said letter comes from a group company (Syarikat Pembinaan Aiyong) and not the defendant.	P10
5	21/3/2015	The defendant confirmed the salary deduction exercise in a letter and also ordered SP3 to report for duty at the Gua Musang, Kelantan office to set up the internal financial control system.	P14
6	31/3/2015	11 days later, SP3 wrote a letter electing to accept the salary reduction but to remain in the Ipoh Head Office. For this purpose a term sheet "Varied Terms of Employment" (exhibit P17) was duly signed by the parties on 14/4/2015.	P15
7	14/4/2015	A lop sided varied terms and conditions of employment which is all in favor of SP3, drafted and prepared by SP3 with no intervention of the HR department came into existence.	P17
8	28/5/2015	The defendant however approximately 1½ month later *via* a letter asserted that the arrangement under exhibit P17 was not workable as SP3 holds an important and fundamental position in the defendant as the Group Financial Controller, and wishes to revert back to the former terms and conditions.	P18

9	16/2/2015	SP3 wrote rejecting the suggestion and opted to follow the terms in exhibit P17	P19
10	20/6/2015	The defendant issued a letter to second SP3 to the Gua Musang, Kelantan Office (a second time) as was instructed prior to the varied terms of employment (exhibit P17) for him to set up the internal financial control system in that said office	P20
11	26/6/2015	SP3 however *via* a letter refused to comply with the said instruction by the defendant	P21
12	14/9/2015	Approximately 2½ months later, the defendant issued another instruction for the defendant to report for duty in the Terengganu office also to set up the internal financial control system there	P22
13	30/9/2015	SP3 similarly defied the said instruction in writing	P23
14	6/10/2015	SP3 was required to explain his defiance of the lawful instructions of the defendant	P24
15	8/10/2015	SP3 wrote and denied any misconduct and continued relying on the terms sheet on variation of the terms of employment (exhibit P17)	P25
16	15/10/2015	The defendant issued notice to commence a domestic inquiry proceeding against SP3 for his alleged misconduct and was duly suspended from his employment	P26
17	9/11/2015	SP3 *via* his letter again denied any wrong doing and continued relying on the terms sheet on variation of the terms of employment (exhibit P17)	P27
18	9/11/2015	On 9/11/2015 the domestic inquiry tribunal found him guilty to which SP3 did not offer an appeal. The said tribunal elected not to punish SP3 for his misconduct but instead recommended to the defendant to which the defendant did *via* a letter dated 7/1/2016 (exhibit P37) that SP3 report back for duty.	P37
19	11/1/2016	SP3 still in defiance, wrote insisting on the varied terms of employment in exhibit P17	P36
20	12/1/2016	The defendant wrote instructing SP3 to report for duty but he still remained defiant and refuses to do so	P40

21	14/1/2016	In an act of utter defiance, SP3 wrote imposing conditions for his return and in failing so claimed to have been constructively dismissed	P45
22	15/1/2016	A final reminder was issued instructing SP3 to report for duty but defiantly he failed to do so.	D57

[43] The equitable doctrine is well settled that when a party comes to court, he has to ensure that his hand are not tainted. Obviously from the facts as chronologically tabulated above, the plaintiff's hand are not clean of misconduct in his employment with the defendant. In *Ngeow Voon Yean v. Sungei Wang Plaza Sdn Bhd/Landmarks Holding Bhd* [2006] 3 CLJ 837; [2006] 5 MLJ 113 the FC stated:

i. Doctrine of Superior Orders applies in Malaysia;

ii. Most fundamental implied duty of an employee is to obey all lawful and reasonable orders of his employers with respect to the performance of his service;

iii. The concept of an order being manifestly wrong has no part in this doctrine.

iv. It has been held that it is not for the employee to question the legality of such orders when it is given and to obey forthwith;

v. Protest about its illegality must be in a separate proceeding.

vi. The rational would be that to allow the employee to question the legality of every order given would paralyse the management in getting work done (*Rashriya Girni Kamgar Singh v. Genda Lai Mills Co* [1951] ICR 604),

[44] SP3 had wilfully disobeyed the lawful and reasonable three orders to be seconded to Gua Musang (twice) and Kuala Terengganu (once) in defiance of this doctrine. Similarly, he had also defied three written notices to report back for work. If he disobeys, he takes the risk, if the court finds the order to be lawful or reasonable. I find the defendant's orders seconding SP3 as mentioned above to be lawful and reasonable which is expected in any organisation with the size of the defendant's undertaking. There is no evidence of bad faith in those said orders by the defendant and certainly it is not for the employee to question such orders as the law provides a separate forum to address any grievances as regard to such orders. It is not the prerogative of SP3 at any material time to veto such orders as allowing such an action would paralyse the organisation.

[45] I find clearly, that SP3 is in breach of the superior orders doctrine and notwithstanding the lop-sided variation (exh. P17) solely in favour of the plaintiff. The law is settled that a contract of employment cannot remain static over a period. Some element of change is inevitable. In the strict sense of the law, both parties must mutually agree to any variation. But if SP3 refuses to accept the order to be seconded to Gua Musang and Kuala Terengganu respectively, this does not mean that he can exercise a power of veto over the said order if the employer justifies the order. As an employee, he is to comply with the lawful orders but is allowed to address grievances at a separate forum. Ultimately the employer retains an equal right lawfully to terminate the contract (*Grix v. Munford Ltd* case). The test is reasonableness of the order and not whether the defendant was in breach of the contract of employment (*Farrant v. Woodroffe* [1980] IRLR 50, EAT). Throughout the proceeding, I find that SP3 had not been able to adduce any shred of material of probative value that would show elements of *mala fide* and/or unreasonableness in the actions of the defendant in seconding him to the defendant's offices in Gua Musang, Kelantan and Terengganu temporarily in order to set up the internal financial control system to which as the Group Financial Controller he is more appropriate to undertake. I am unable to accept SP3's arguments that he could do it remotely from Ipoh and *via* mobile communication alone. It is not his prerogative to decide such things. I find such reasoning to be unreasonable of the standard expected of a person in such a senior position.

[46] Though found guilty for insubordination after a domestic inquiry, SP3 was not punished but requested to report back for duty. However, SP3 remained defiant and refuses to comply with the order of the defendant and elected instead to walk out of his employment and claimed to be constructively dismissed. Anchored on the chronological facts as tabulated, I am not convinced on the alleged substantial breach of contract by the defendant or victimisation in the circumstances of the case. Victimisation entails an innocent workman being punished because he has in some way displeased the employer or where an employee has committed an offence but is given a punishment disproportionate to the gravity of the offence. I find no plausible evidence of victimisation in this case. The court cannot uphold a plea of victimisation in the absence of positive proof.

[47] I would like to mention also that the issue of the unilateral reduction of pay constitute a breach on the part of employer for which SP3 did not seek to enforce his right when it occurred which subsequently over a period of three months was rectified by the defendant. I find SP3 had waived his right to act on it but instead varied the terms of the employment (exh. P17) which subsequently was accepted by the defendant. Being a senior member of the

management (Group Financial Controller) his presence was required in other offices of the defendant around the country to address managerial and/or financial issues arising. The part time and informal approach to his position in the defendant was realised not to be feasible and proven to be most impractical in the circumstances of the case which had led to the defendant requesting him to go back on full time service with all the benefits (exh. P18) which he had rejected.

[48] The issue of constructive dismissal in such circumstances does not arise. As mentioned earlier, the law is settled in that a contract of employment cannot remain static over a period. Some element of change is inevitable to suit the predicament and/or circumstances faced by the company. When such a situation arises, it is incumbent on the employee to appraise his situation and options but he certainly has no power to veto the prerogative of the company that is exercised in good faith for the benefit of the company and thereafter making a bare claim of constructive dismissal in the circumstances. It is just plainly not plausible.

[49] In the present case, the presence of SP3 was required temporarily (a few months) in the offices of the defendant in Kelantan and Terengganu. It is expected in an organisation of such a size and undertaking. It is deeply entrenched principle in industrial jurisprudence that, that is the prerogative of the employer though not absolute and untrammelled. The exercise of that prerogative must not be actuated by *mala fide* or unfair labour practice under the guise of the pretext of the best interest of the company. In *Ladang Holyrood v. Ayasamy Manikam & Ors* [2004] 2 CLJ 697; [2004] 3 MLJ 339, His Lordship Ariffin Zakaria JCA (as His Lordship then was) referred to the award in *Soon Seng Cement Products Sdn Bhd & Anor v. Non Metallic Mineral Products Manufacturing Employees's Union* [1996] 1 ILR 414, *Assembly Services Sdn Bhd, Shah Alam/UMW Engineering Sdn Bhd Shah Alam & UMW (M) Holdings Sdn Bhd, Shah Alam (joined as a party) v. Motor Assemblers Supervisory Staff Union, Peninsular Malaysia* [1985] 1 ILR 489 where His Lordship stated:

> … the company has the right to transfer its employees within its organisation…But if the transfer is actuated with improper motives, it will attract the jurisdiction of the court. The power to transfer is, therefore subject to (according to *Ghaiye's Misconduct in Employment* at pp 254-255) the following the following well recognised restrictions:
>
> (a) There is nothing to the contrary in the terms of employment;
>
> (b) The management has acted *bona fide* and in the interest of its business;
>
> (c) The management is not actuated by any indirect motive or any kind of *mala fide*;

(d) The transfer is not made for the purpose of harassing and victimising the workman; and

(e) The transfer does not involve a change in the conditions of service.

[50] These are facts which are to be ultimately decided by court. In the circumstances of the case, based on what that has been adduced before me, I find no reason to hold that SP3 had been constructively dismissed. As a matter of fact, I hold that he had voluntarily left the employment of the defendant. He elected not to exercise his right to report back for duty and then address his grievances with the defendant. There are simply no plausible evidence on the part of defendant sufficient in law that had directly dismissed him and/or cause him to be constructively dismissed.

Conclusion

[51] In the circumstances, the facts adduced do not support the four conditions to bring out the conclusion for constructive dismissal and on balance of probabilities, I find the plaintiff had failed to prove its case against the defendant and therefore the plaintiff's claim is dismissed with cost. With the same observation above, the counterclaim by the defendant is allowed for the breach of contract of employment by the plaintiff and a further order that damages to be assessed by the Senior Assistant Registrar (SAR).